No. 09-1123

IN THE
Supreme Court of the United States

WYETH LLC, *et al.*,

Petitioners,

v.

DONNA SCROGGIN,

Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Eighth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus curiae addresses the following issue only:

Whether a partial retrial limited to punitive damages violates the Seventh Amendment.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to promoting limited and accountable government, supporting the free enterprise system, and opposing abusive enforcement actions and civil litigation by the government and private litigants.

In particular, tort reform activities constitute a substantial portion of WLF's work. WLF is concerned that economic development and consumer welfare not be impeded by improper and excessive punitive damages awards. WLF has regularly appeared before this and other federal courts in cases raising punitive damages issues. *See, e.g., Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

WLF has no direct interest, financial or otherwise, in the outcome of this case. It is filing its brief due solely to its interest in eliminating improper

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for WLF provided counsel for Respondent with notice of its intent to file this brief. All parties have consented to the filing of this brief. Letters of consent have been lodged with the Court.

punitive damages awards. WLF agrees with Petitioners that review is warranted on the second question presented: whether a trial court can admit the testimony of a scientific expert without expressly addressing the applicability of the factors set out in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). However, this brief addresses only the first question presented: whether a partial retrial limited to punitive damages violates the Seventh Amendment.

STATEMENT OF THE CASE

Respondent Donna Scroggin was diagnosed with breast cancer in June 2000. During the prior 11 years, she had been taking (pursuant to a doctor's prescription) various hormone replacement therapy drugs manufactured by Wyeth Pharmaceuticals Inc. and Pharmacia & Upjohn Co.[2] Scroggin filed a product liability suit in 2004 against Wyeth and Upjohn, contending that they failed to provide her with adequate warning of the risk of breast cancer from that therapy. She alleged that Petitioners' failure to provide adequate warning was the proximate cause of her cancer.

The district court conducted a bifurcated trial before a single jury, with liability determined first and punitive damages determined second. In the first phase, the jury determined on February 25, 2008, that Wyeth and Upjohn provided inadequate warning, which resulted in Scroggin's breast cancer; it awarded $2.7 million in compensatory damages. In the second phase,

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[2] Petitioners, who include corporate successors to those companies, are referred to herein as Wyeth and Upjohn.

the same jury determined on March 6, 2008, that both defendants were liable for punitive damages. It found Wyeth liable for $19.4 million in punitive damages and Upjohn liable for $7.8 million.

Thereafter, the trial judge denied Wyeth's and Upjohn's motion for judgment as a matter of law (JMOL) with respect to liability, but granted the motion with respect to punitive damages. Pet. App. 47a-110a. The judge ruled that he had erroneously admitted certain expert testimony in support of Scroggin; he ruled that, with the erroneously admitted testimony excluded, Scroggin "did not produce sufficient evidence to create an admissible issue under the clear and convincing standard required for punitive damages." *Id.* at 71. The judge explained that, under applicable Arkansas law:

> To justify an award of punitive damages, "it must appear that the negligent party knew, or had reason to believe, that his act of negligence was about to inflict injury, and that he continued in his course with a conscious indifference to the consequences, from which malice may be inferred." Arkansas law requires an "element of willfulness or such reckless conduct on the part of the defendant as is equivalent thereto."

Id. at 72a (quoting *Union Pacific R.R. Co. v. Barber*, 149 S.W. 3d 325, 343 (Ark. 2004). The court concluded, "The record, absent erroneously admitted information, reflects insufficient evidence of wantonness, willfulness, or reckless disregard from which malice could be

inferred." *Id.* at 73a.[3]

The court went on to hold alternatively that if it had not granted JMOL with respect to punitive damages, Wyeth and Upjohn would have been entitled to a new trial on punitive damages in light of the court's erroneous admission of the disputed expert testimony in support of Scroggin. *Id.* at 109a-110a.

The Eighth Circuit affirmed in part and vacated in part. *Id.* at 1a-44a. The appeals court upheld the judgment in favor of Scroggin with respect to liability and compensatory damages, *id.* at 22a-38a and 44a, and the grant of JMOL to Upjohn on the issue of punitive damages. *Id.* at 41a. The appeals court also ruled that "there was sufficient evidence upon which a jury could conclude that Wyeth acted with reckless disregard to the risk of injury" and thus it reversed the grant of JMOL to Wyeth on the issue of punitive damages. *Id.* at 43a. Finally, the appeals court affirmed the district court's conclusion that the testimony of Scroggin's expert witness on punitive damages had been improperly admitted into evidence and that the jury's consideration of that testimony amounted to prejudicial error – and thus that Wyeth was entitled to a new trial. *Id.* at 41a, 43a.

Wyeth argued in the appeals court that the Seventh Amendment requires any retrial to encompass

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[3] Arkansas's willfulness/recklessness standard for an award of punitive damages is substantially similar to the standard applied in most other States. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 908 and comment b (1978).

all issues respecting its liability to Scroggin. Wyeth Br. 103. The appeals court rejected that argument and limited the new trial to punitive damages issues. Pet. App. 43a-44a. Citing this Court's decision in *Gasoline Products Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931), the appeals court concluded that "a new trial may be had on punitive damages alone without injustice to the parties." *Id.*

REASONS FOR GRANTING THE PETITION

This petition raises issues of exceptional importance. The Seventh Amendment to the Constitution provides in relevant part, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The "right to trial by jury" has long been understood to constitute those jury trial rights that existed under the English common law when the Seventh Amendment was adopted in 1791. It is well accepted that "at common law there was no practice of setting aside a verdict in part. If the verdict was erroneous with respect to any issue, a new trial was directed as to all." *Gasoline Products*, 283 U.S. at 497. The Eighth Circuit nonetheless mandated a partial retrial in this case limited to determining whether and to what extent Wyeth should be liable for punitive damages, and at the same time upheld an earlier jury's verdict that found in favor of Scroggin on her product liability claim and found Wyeth liable for $2.7 million in compensatory damages. Review is warranted to consider whether the appeals court's partial retrial order is consistent with Wyeth's Seventh Amendment rights.

The Petition describes in detail the sharply conflicting views of the federal appeals courts regarding the circumstances under which partial retrials in jury cases are consistent with the Seventh Amendment, both generally, and specifically with respect to partial retrials confined to punitive damages. Pet. 9-18. That description amply demonstrates the validity of Petitioners' contention that lower courts have "struggled" to apply the Seventh Amendment standards set forth in *Gasoline Products* and that the appeals courts have adopted "divergent and irreconcilable approaches." *Id.* at 11, 18.

Rather than repeat that analysis, WLF writes separately to focus on the inconsistency between the Eighth Circuit's approach in this case and any meaningful understanding of Seventh Amendment rights. Since the 18th century, the right to a trial by jury has been understood to include the right to have the facts of one's case determined by a jury whose findings are not unnecessarily constrained or prejudiced by the judicial system. That right has included the right to have the *same* jury hear and decide all closely related issues. Review is warranted to resolve the clear conflict between that understanding and the Eighth Circuit's authorization in this case of a partial retrial on punitive damages.

Review is also warranted because of the importance of the issue to the administration of civil justice in the federal court system. The Court has explicitly recognized "the stark unpredictability of punitive awards" and that such unpredictability calls into question the "fairness" of the federal civil justice

system. *Exxon Shipping Co. v. Baker,* 128 S. Ct. 2605, 2625 (2008). Considerable evidence suggests that permitting partial retrials regarding punitive damages exacerbates to the unpredictability of punitive damages awards. Moreover, the evidence suggests that permitting such partial retrials is a considerable disadvantage to tort defendants, who on average are likely to face larger monetary judgments than if a single jury considers all related tort claims. Review is warranted to ensure that a failure to enforce Seventh Amendment rights does not contribute to the widely perceived randomness in punitive damages awards and does not work to the unfair disadvantage of a large class of federal court litigants.

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S UNDERSTANDING OF SEVENTH AMENDMENT LIMITATIONS ON PARTIAL RETRIALS

Any understanding of Seventh Amendment constraints on partial retrials must begin with the Court's 1931 decision in *Gasoline Products.* That decision marks the only occasion on which the Court has considered the extent of such constraints. Lower courts have struggled ever since to apply the Court's holding to the numerous circumstances under which the opportunity for partial retrials arise – including, with increasing frequency, cases in which (as here) a jury's compensatory damages award is upheld on appeal but its punitive damages award is overturned.

The plaintiff in *Gasoline Products* sued to recover royalties allegedly due under a contract by which it licensed to the defendant use of equipment and a method of producing gasoline. The defendant alleged in a counterclaim that the plaintiff was in breach of contract because the equipment did not work as well as the plaintiff had promised. The district court entered judgment on a jury verdict that found in favor of the plaintiff on its claim and in favor of the defendant on its counterclaim. The appeals court upheld the judgment in favor of the plaintiff but reversed the judgment for the defendant, finding that the trial judge had erred in his jury instructions regarding the measure of damages on the counterclaim. In remanding the case to the trial court, the appeals court ordered that a new jury trial be restricted to the computation of damages on the counterclaim; the initial jury's finding of liability on the counterclaim, as well as its findings regarding the plaintiff's royalty claim, were not to be re-examined by the second jury. 283 U.S. at 496.

This Court reversed the appeals court, agreeing with the plaintiff's assertion that the Seventh Amendment prohibited a partial retrial limited to a determination of damages awardable on the counterclaim. *Id.* at 497-500. The Court began by recognizing that, under the common law as it existed at the time the Seventh Amendment was ratified in 1791, partial retrials in jury cases were *never* permitted: "If the verdict was erroneous with respect to any issue, a new trial was directed as to all." *Id.* at 497. The Court held, however, that the Seventh Amendment does not require precise compliance with all "old forms of procedure." *Id.* at 498. It explained that "the

Constitution is concerned, not with form, but with substance," and that "where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and *separable* issue must be tried again." *Id.* at 498, 499 (emphasis added).

Thus, the Court focused on whether it "clearly appeared" that the factual issue that had to be retried (the amount of damages on the counterclaim) was "distinct" and "separable" from a key finding of fact that was upheld by the appeals court (the plaintiff's liability on the counterclaim). *Id.* at 500. The Court determined that they were not separable and thus that the Seventh Amendment required a new trial of all issues raised by the counterclaim:

> Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial.

Id.[4]

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[4] There is no indication that the defendant in *Gasoline Products* argued, in the alternative, that if the Petitioner (the plaintiff) were entitled to a new jury trial on all issues raised by the counterclaim, then it (the defendant) was entitled to a new trial on all raised by the plaintiff's royalty claim. The Court nonetheless indicated in *dicta* that the Seventh Amendment would not require such a result because the issues arising under the royalty claim were "clearly separable from all others." *Id.* at 499.

In deciding that the retrial should be limited to a consideration of punitive damages, the Eighth Circuit included a citation to *Gasoline Products*, but it utterly failed to undertake the separability analysis mandated by this Court. Rather, the appeals court applied its own cryptic "injustice" test: a partial retrial on punitive damages alone is constitutionally permissible so long as it may be conducted "without injustice to the parties." Pet. App. 44a.

The appeals court provided no explanation why a partial retrial would neither be an injustice and nor infringe the parties' Seventh Amendment rights. It suffices to say that in the absence of any indication that the appeals court ever examined whether it "clearly appeared" that issues of fact raised by Scroggin's punitive damages claims were "distinct" and "separable" from issues of fact determined by the first jury in connection with its award of $2.7 million in compensatory damages, the Eighth Circuit's constitutional analysis directly conflicts with *Gasoline Products*.

Moreover, if one applies the *Gasoline Products* separability analysis to the facts of this case, the close relationship between an award of compensatory damages and an award of punitive damages is readily apparent. Wyeth's tort liability for Scroggin's injury is premised on her claims that: (1) Wyeth knew or should have known that its hormone therapy drugs posed a significant risk of breast cancer; and (2) Wyeth was negligent in failing to adequately warn Scroggin of that risk.

As explained by the Eighth Circuit, to obtain punitive damages, Scroggin and similarly situated plaintiffs must demonstrate not only that the defendant was negligent in failing to provide adequate warning, but also that "'the negligent party knew, or had reason to believe, that his act of negligence was about to inflict injury, and that he continued in his course with a conscious indifference to the consequences, from which malice may be inferred.'" Pet. App. at 72a (quoting *Union Pacific*, 149 S.W. 3d at 343). In other words, a finding of negligence is an element both of a claim for compensatory damages and of a claim for punitive damages. Moreover, both claims examine the same set of facts: the defendant's knowledge of risks posed by its product and the reasonableness of the defendant's conduct as measured by the extent of warnings provided. To establish liability for compensatory damages, the plaintiff must demonstrate that the defendant acted culpably regarding the provision of warnings; to establish liability for punitive damages, the plaintiff must demonstrate that the defendant acted *really* culpably regarding the provision of warnings. It is difficult to understand how the two issues could be deemed "distinct" and "separable" under *Gasoline Products*'s Seventh Amendment standard. That decision establishes that when, as here, two issues are so closely "interwoven," submitting one of the issues to a jury independently of the other inevitably sows "confusion and uncertainty" and thus violates the right to a fair trial protected by the Seventh Amendment. 283 U.S. at 500.

WLF notes that *none* of the other federal appeals courts that have permitted partial retrials limited to

punitive damages have undertaken the separability analysis mandated by *Gasoline Products*. Rather, all such decisions have been based on a conclusion that the trial error necessitating a retrial on punitive damages did not infect the jury's finding that the defendant was liable for compensatory damages. *See, e.g., Grimm v. Leinart*, 705 F.2d 179, 183 (6th Cir. 1983) (finding no constitutional error because "the finding of liability and the award of compensatory damages are in no way intermingled with the improper punitive damages instruction"); *Atlas Food Systems and Services, Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 599 (4th Cir 1996) (a decision to set aside the first jury's punitive damages award based on jury "prejudice" did not require a full retrial on all issues in the absence of evidence that the prejudice had "infected" the jury's rulings on other claims). But the separability test established by this Court has nothing to do with the propriety of the *first* jury's finding that the defendant is liable for compensatory damages; instead, the Seventh Amendment issue is whether a *second* is subject to "confusion and uncertainty" because the factual issues contested on retrial are not "distinct" and "separable" from issues decided by the first jury. *Gasoline Products*, 283 U.S. at 500.[5] WLF is aware of no federal appeals court decision that has upheld a partial retrial limited to punitive damages based on a separability analysis.

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[5] The cause of any such confusion and uncertainty is readily apparent. The jury in a retrial limited to punitive damages will be told that a prior jury has already determined that the defendant acted negligently and thus is liable for compensatory damages. A retrial juror could easily be confused if, after her independent review of the same evidence, she harbors doubts regarding the defendant's culpability.

Finally, it should be noted that the jury in a partial retrial limited to punitive damages is asked to make two distinct findings: (1) whether the defendant is liable for punitive damages; and (2) if so, the amount of any such damages. The Court has observed that the second determination is not a "finding of fact" in any traditional sense, such that preservation of the right to a jury determination of the amount of punitive damages may not fit easily as a core of Seventh Amendment right.[6] But the first determination – whether a defendant is liable for punitive damages, *i.e.*, whether the defendant acted willfully or with reckless disregard for the plaintiff's safety – is based on findings that are within the sole province of the finder of fact.

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[6] In *Cooper Industries, Inc. v. Leatherman Tool Group*, 532 U.S. 424 (2001), the Court determined that federal appeals courts should apply a *de novo* standard when reviewing district court determinations regarding whether a punitive damages award is constitutionality excessive. The Court explained:

> Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a fact tried by the jury. Because the jury's award of punitive damages does not constitute a finding of fact, appellate review of the District Court's determination that an award is consistent with due process does not implicate the Seventh Amendment concerns raised by respondent and its amicus.

532 U.S. at 437. But the Court emphasized that its decision did not call into question the Seventh Amendment right to a jury determination regarding whether the defendant acted in a manner warranting the imposition of punitive damages. *Id.* at 439 n.12 ("nothing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard . . . jury findings" regarding the nature of the defendant's conduct).

Accordingly, the *Gasoline Products* standard is just as applicable to partial retrials limited to punitive damages as it is to other partial retrial issues.

In sum, review is warranted because the appeals court's decision conflicts so sharply with the Seventh Amendment standards set forth by this Court in *Gasoline Products.*

II. REVIEW IS WARRANTED BECAUSE OF THE IMPORTANCE OF THE ISSUE TO THE ADMINISTRATION OF CIVIL JUSTICE IN THE FEDERAL COURT SYSTEM

Review is also warranted because of the importance of the issue to the administration of civil justice in the federal court system. The Petition reaches beyond the concerns of a single litigant who is unhappy with the verdict rendered by an initial jury and is hoping to do better the second time around if permitted to wipe the slate clean. Rather, academic research supports the view that permitting partial retrials limited to punitive damages increases the unpredictability of punitive awards and prejudices defendants by, on average, leading to higher total damages than if all issues were decided by a single jury. Thus, review is warranted not simply because the Eighth Circuit's standard conflicts sharply with long-accepted notions of Seventh Amendment rights, but also because that standard has a major impact on a significant number of litigants.

A. Punitive Damages Awards Are Unpredictable and Likely to Increase in Size if Partial Retrials Limited to Punitive Damages Are Upheld

The Court has explicitly recognized "the stark unpredictability of punitive awards" and that such unpredictability calls into question the "fairness" of the federal civil justice system. *Exxon Shipping Co. v. Baker,* 128 S. Ct. 2605, 2625 (2008). *Exxon* adopted new federal maritime law limitations on punitive damage awards based primarily on the Court's desire to reduce perceived unfairness in punitive damages awards. *Id.* at 2627. The Court explained:

> Whatever may be the constitutional significance of the unpredictability of high punitive awards, this feature of happenstance is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another. Thus, a penalty should be reasonably predictable in its severity, so that even Justice Holmes's "bad man" can look ahead with some ability to know what the stakes are in choosing one course of action or another. See The Path of the Law, 10 Harv. L. Rev. 457, 459 (1897). And when the bad man's counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage.

Id.

Wyeth's circumstances provide anecdotal support for the conclusion that punitive damages awards are highly unpredictable. Scroggin's case was the third to go to trial following several years of coordinated discovery among thousands of similar cases transferred to the Eastern District of Arkansas by the Judicial Panel on Multidistrict Litigation. Because all three cases were selected for bellwether trials, one can reasonably assume that all three were typical of many of the consolidated cases and thus roughly similar to one another. Yet, while the first two trials ended in defense verdicts, the jury in the Scroggin trial not only awarded substantial compensatory damages, it also held Wyeth liable for $19.36 million in punitive damages. Pet. at 4. Although the different outcomes may be explainable in part by factors unrelated to Wyeth's culpability (*e.g.*, one of the other plaintiffs may have been unable to establish that her decision to undergo hormone replacement therapy would have been different had Wyeth provided a more thorough warning), it is difficult not to attribute the huge variation in monetary outcomes among the three cases in large measure to the unpredictable (some would say random) nature of punitive damages awards.[7] Permitting partial retrials limited to punitive damages would inevitably produce even greater unpredictability. It would potentially double the number of juries hearing tort claims, thereby significantly increasing the number

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[7] *Exxon Shipping* cited three separate law review articles that confirmed the unpredictability of punitive awards by testing the reactions of numerous "mock" juries, when confronted with identical hypothetical cases. *Id.* at 2626 n. 17.

of juries with the potential to award damages (either punitive damages or noneconomic compensatory damages) in amounts far exceeding the norm for similar cases.

Allowing partial retrials limited to punitive damages is also likely to lead in the aggregate to increases in the total damages (compensatory plus punitive damages) awarded against a defendant. For example, one phenomenon noticed among "mock" juries is that there is a direct correlation between the harm suffered by the plaintiff and the willingness of jurors to impose punitive damages. Cass Sunstein, Daniel Kahneman, and David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law*, 107 YALE L.J. 2071, 2104 (1998). Interestingly, this increased willingness to award punitive damages in cases in which the plaintiff has suffered significant compensatory damages is largely unrelated to jurors' assessment of the defendants' blameworthiness; that is, largely-blameless defendants may find themselves facing substantial punitive damages judgments based primarily on a jury's assessment that the plaintiff was severely injured. *Id.*

That finding suggests that permitting partial retrials limited to punitive damages is, on average, disadvantageous to defendants. A partial retrial limited to punitive damages by definition involves a prior (often substantial) compensatory damage award against the plaintiff. The Sunstein study suggests that the existence of the compensatory damage award makes it more likely that a second jury will award punitive damages in an amount commensurate with the size of

the compensatory damages award. In contrast, if the district court is directed to retry the entire case, one can reasonably posit that in at least some instances the second jury will award no compensatory damages (or a greatly reduced level of compensatory damages), and in those instances the defendant would face a significantly reduced punitive damages award.[8]

Partial retrials limited to punitive damages are also prejudicial to defendants because they eliminate the views of those individuals who, as members of the initial jury, were the most reluctant to find the defendant liable. The members of the initial jury are likely to have had a variety of views on the issues of liability and damages. Some may have believed that the defendant should not have been held liable at all but ended up voting to impose liability as a compromise that entailed an award of damages that was somewhat less than jurors at the other end of the spectrum wished to award. The new jury is equally likely to have some members

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[8] In contrast, enforcing the Seventh Amendment bar against partial retrials limited to punitive damages would not unfairly prejudice plaintiffs. It is true that if the Court bars partial retrials limited to punitive damages, a plaintiff may be required to relinquish a compensatory damages award in return for the opportunity to seek retrial on punitive damages. However, a plaintiff whose compensatory damages award is affirmed but whose punitive damages award is overturned generally is provided a choice of forgoing a retrial and thereby preventing his compensatory damages claim from being placed at risk. *See, e.g., Watts v. Laurent*, 774 F.2d 168, 181 (7th Cir. 1985). Thus, even if Wyeth prevails on its Seventh Amendment claims, Scroggin presumably would still be free (assuming no other successful challenges to the judgment) to collect her $2.7 million compensatory damages award by simply forgoing a retrial.

who are inclined to find the defendant not liable. But those new jurors will be instructed that the issue of liability has already been decided against the defendant. Under these circumstances, negotiations among members of a jury limited to considering only punitive damages issues will be starting at a different (higher) point on the number line than would negotiations among members of a jury authorized to decide all issues of fact. In the latter situation, the most defendant-friendly jury members will, in a sense, commence negotiating punitive damages at a negative number, because they are the ones who had the greatest doubts about the defendant's liability and may have believed that the compensatory damages award was too high. But when a jury is limited to considering only punitive damages issues, the most defendant-friendly jury members will commence negotiating at a higher number: zero. Not surprisingly, research has demonstrated that juries that begin consideration of punitive damages at higher dollar values tend to arrive at higher final awards. David Schkade, Cass Sunstein, and Daniel Kahneman, *Empirical Study: Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1140 (2000).

B. Behavioral Research Also Suggests That Partial Retrials Limited to Punitive Damages Lead to Higher and More Frequent Punitive Damages Awards

Psychologists and behavioral economists have undertaken numerous studies regarding how individuals make choices when faced with uncertainty. Jury

deliberation is a prime example of decision-making in the face of uncertainty – individual jurors use the limited amount of evidence provided to them to choose whether to favor the claims of the plaintiff or the claims of the defendant. Choice theory suggests that if partial retrials limited to punitive damages are authorized, punitive damages awards will increase in size and frequency.

If most individuals engaged in a fully rational decision-making process, relatively similar outcomes might be expected regardless whether a court ordered a retrial on all issues or only a partial retrial limited to punitive damages. But psychologists have discovered that most people suffer from a variety of cognitive defects and biases that lead to severe and systematic errors in decision-making. Amos Tversky & Daniel Kahneman, *Judging Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (Sept. 1974).

One such bias of particular relevance to this case was termed "insensitivity to base rate" by Tversky and Kahneman. In a partial retrial limited to punitive damages, the relevant "base rate" is the percentage likelihood that the original jury was correct in finding that the defendant culpably caused the plaintiff to suffer injury. The trial judge would have instructed the original jury that it should find the defendant liable so long as it concluded that it was more likely than not (*i.e.*, at least a 50.1% probability) that the plaintiff met his/her burden of proof. Of course, the jury may have found the probability (the "base rate") to be significantly higher than 50.1% – perhaps 60%, 70%, or even 80%. But the important point is that a jury that

determines both liability issues and punitive damages issues will account for its own doubts as to the correctness of its findings (*i.e.*, the possibility that it erred in imposing compensatory damages) when determining whether and to what extent the defendant should be held liable for punitive damages.

Jurors at a second trial will not be aware of the first jury's thought processes, of course, including the first jury's conclusions regarding likelihood of liability. Moreover, once they are told that the issue of liability has already been determined by a prior jury, Tversky and Kahneman's work suggests that the jurors, because they are insensitive to the base-rate probability that the original jury erred in finding liability, are likely to dramatically overestimate the accuracy of that liability determination. Indeed, even if the jurors at the second trial were exposed to *all* of the evidence available at the first trial, studies regarding "insensitivity to base rate" suggest that those jurors will express a far greater degree of certainty regarding the defendant's liability than will members of the original jury. It seems highly probable that jurors who believe it 99% likely that a defendant acted culpably will be willing to take the extra step to find that the defendant acted with sufficient "reckless indifference" to justify an award of punitive damages. A juror whose belief in the defendant's culpability stands at only 51% is far less likely to take that step. Such differences in jurors' frames of reference have been demonstrated to make a huge difference in jurors' willingness to award damages. *See* Edward J. McCaffrey, *et al.*, *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341 (Aug. 1995) (study finding that jurors will

award significantly different amounts, under an identical factual scenario, depending on their starting reference points). Moreover, the starting reference point of a juror who did not play a role in imposing liability for compensatory damages may well be that of someone who has not yet had an opportunity to express his personal disapproval of the defendant's conduct. A juror participating in a partial retrial limited to punitive damages might well be far more willing to impose punitive damages on a defendant, as a means of expressing personal disapproval, than would a juror who previously had a hand in imposing compensatory liability.

Review is warranted because studies regarding "insensitivity to base rate" suggest that permitting partial retrials limited to punitive damages will in the aggregate discriminate against defendants by leading to more frequent imposition of punitive damages. Such discrimination is precisely the sort of unfairness *Gasoline Products* had in mind when it imposed Seventh Amendment limitations on alterations of jury trial rights recognized by the common law in 1791.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

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Counsel wish to thank Corbin Barthold, a student at the University of California Berkeley School of Law, for his assistance in preparing this brief.

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